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IN THE

Supreme Court of the United States

October Term, 1948.

No. 118.

ALBERT RALPH PETTI,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE PETITIONER.

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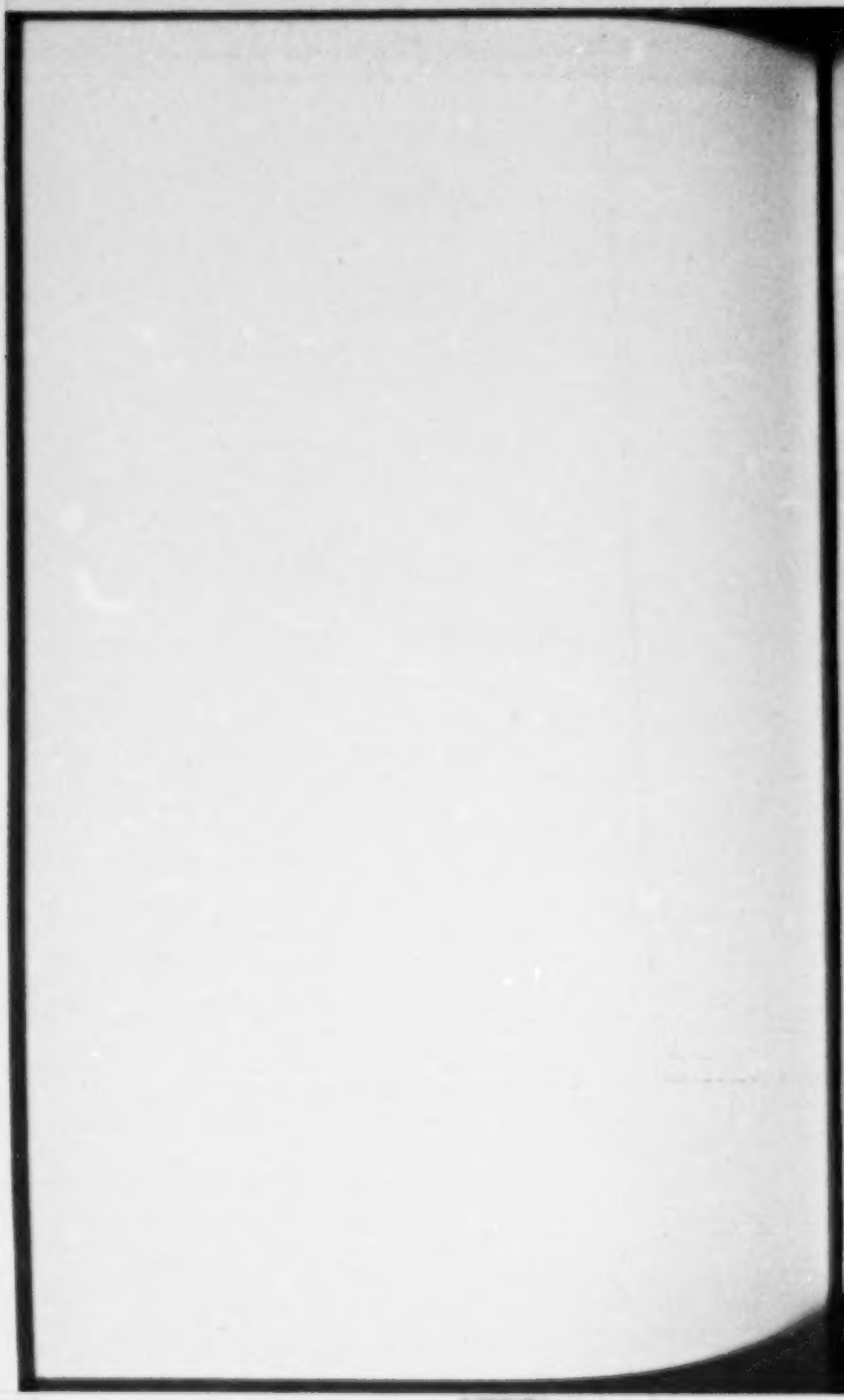

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Opinion Below.

The opinion of the Court of Appeals (85-89)* is reported at 168 Fed. (2d) 221.

Statement.

The petitioner was convicted in the District Court for the Southern District of New York for conspiracy to transport stolen securities in interstate commerce, in violation of 18 U. S. C., Section 418(a). He was sentenced to three years imprisonment and fined $2,500. Following conviction the petitioner was continued on bail pending disposition of his appeal to the Court of Appeals for the Second Circuit.

*Arabic numerals in parentheses, unless the context otherwise indicates, refer to page numbers in the printed Transcript of Record.

Jurisdiction.

The judgment of the Court of Appeals was entered on May 25, 1948 (89). On June 3, 1948 Circuit Judge Chase denied a motion made on behalf of petitioner for the Court of Appeals to stay the issuance of a mandate to the District Court. Application was then made to Justice Jackson of this court and a temporary stay of mandate was granted on June 8th to and including June 14, 1948. On June 14, 1948 an order of this court was signed by Mr. Justice Jackson to stay the mandate of the United States Court of Appeals, providing that petition for certiorari was filed within the statutory period provided by law, and further that if a petition for certiorari is duly filed the stay to continue pending the ultimate decision of this court.

The petition for writ of certiorari and supporting papers were duly filed on June 24, 1948. This court granted the petition for writ of certiorari on October 11, 1948 (90). The petitioner is now at liberty on continued bail.

The jurisdiction of this court is conferred by Title 28, U. S. C., Section 1254(1).

Indictment.

The indictment contained two counts. Count I charged that the petitioner and one, Charles Solomon Rosenberg, unlawfully transported and caused to be transported in interstate commerce, securities of the value of over $5,000 which had theretofore been stolen, knowing the securities to have been stolen. The particular securities enumerated in Count 1 of the indictment were 185 American Express Travelers checks of the value of $5,400 and 128 American Express Money Orders of the value of $6,850. It is alleged that these instruments were caused to be transported from the City of Newark, New Jersey to the City of New York

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and were previously stolen from the American Express Company in Atlantic City, New Jersey. The count is laid under Title 18, United States Code, §415.

Count 2 of the indictment charged the petitioner and Rosenberg and other persons with conspiracy to violate Title 18, Section 415 of the United States Code, in that they conspired to transport securities of the value of over $5,000 from Newark, New Jersey, to New York, New York, in violation of §418(a), Title 18, U. S. Code. The jury returned a verdict of Not Guilty as to Count 1 and Guilty as to Count 2 of the indictment.

Thus, while petitioner was acquitted of the substantive offense of transporting, he was convicted of conspiracy to transport, although the proof for the conspiracy was identical with the proof for the substantive charge, as will be brought out hereinbelow.

Facts.

(1) Concerning Search and Seizure.

On October 31, 1945, four officers of the Federal Bureau of Investigation were assigned to arrest the petitioner (26, 43, 54, 59), on a charge or charges wholly unrelated to the charges in the indictment under which petitioner was convicted and sentenced herein (34, 36). Having had the information that petitioner was registered at the Hotel Taft in room 340 (43, 59), they proceeded to the hotel and arrived that evening at 7:30 P. M. (26, 43, 54). One of the agents called room 340 on the hotel house phone but received no answer (43); thereupon two of the agents were stationed in the hotel lobby (27, 54), and the other two ascended to room 340 accompanied by an assistant manager (27, 31, 43), with whom arrangements had been made to gain access to the room (33). The hotel man rapped on the door and, receiving no response, opened it with a passkey (44).

The two agents entered the room. The manager stayed outside of the room, locking the door behind them (44). The investigators then made a search of the room, closet and bathroom, after which they were satisfied that the petitioner was not present (44).

While there was testimony by one of the agents that a bench warrant had been issued for petitioner's arrest on the above mentioned unrelated charges, none of the agents had a copy of such warrant with him when entering petitioner's room or during his arrest which occurred some six hours later (34, 37). There was no search warrant to search room 340 of the Hotel Taft (34).

While the propriety of the officer's entry into the room in the first instance may well be questioned, it is certain that having ascertained petitioner's absence, their continued presence in the room was highly improper and a substantial violation of the petitioner's constitutional rights, in view of the lack of a search warrant.

Petitioner returned to his room at 1:30 A. M. the following morning, letting himself in with his key (44). He was arrested and searched personally by the two agents who had remained in his room continuously from 7:30 P. M. the evening before (34, 44, 45, 55). The two agents who had remained in the lobby during this time were then summoned and reported to room 340 (55). A search of the room was then repeated during which the agents found a suitcase in the closet, which contained a paper bag, in which blanks for Travelers checks and American Express Money Orders were found (27, 28, 45-47, 56).

(2) Concerning the Alleged Conspiracy.

It was not until November 2, 1945 that the agents learned of the source of these papers (Typewritten Record, p. 140), and on that date a warrant for petitioner was issued (Typewritten Record, p. 136).

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Thus, after the papers were found in petitioner's possession in the manner described above, the government adduced the following information: On October 26, 1945, a quantity of blank American Express Travelers checks and money orders were stolen from the Atlantic City, N. J. office of the American Express Company (13, 14). On October 27th, an individual by the name of Cash, who was involved in the larceny, brought these papers to petitioner's alleged co-conspirator, Charles Solomon Rosenberg, at his house in Newark, N. J. (17). Rosenberg did not want them; however, at Cash's insistence, he kept the papers and loaned Cash about $30 or $40 to pay his rent (15, 18). Cash did not tell Rosenberg where he got the papers (18).

Rosenberg testified that he went to the Roxy Theatre in New York the next day (October 28, 1945) with Eleanor Strom, and met the petitioner, *quite by accident*, at Fiftieth Street and Broadway (19). He testified further that he told petitioner about the papers in evidence and inquired as to whether petitioner could do anything with them and that pettiioner said he would see and was told to come over to Newark to get the papers. Eleanor Strom was not a witness to their alleged conversation (20). Later that evening petitioner met Rosenberg in Newark and he testified that petitioner took the papers and said, "I will see what I can do with them" (21). This conversation lasted only a few minutes and the two of them were alone (22). Rosenberg testified that he saw petitioner a few times after and told him that if he did not get rid of the papers to return them and he says petitioner told him he could not get rid of the papers (22). These alleged visits were at Rosenberg's house at 133 Mt. Pleasant Avenue, Newark, N. J. (17, 22).

There was also evidence that petitioner had made telephone calls to Rosenberg but the only evidence as to the content of any of the calls was Rosenberg's testimony that on the 28th, petitioner called him and said he would be over (22).

At 1:30 A. M., November 1st, petitioner was arrested as aforesaid at the Hotel Taft, New York, N. Y., with the papers in his possession.

It was on the above mentioned evidence that the jury acquitted petitioner of the substantive charge of transporting but convicted him of conspiring to transport stolen "securities" of a value of more than $5,000 from Newark, N. J. to New York.

(3) Concerning the Alleged "Securities" Described in the Counts of the Indictment.

Government's Exhibit 2, consists of several papers in the usual form of travelers checks issued by the American Express Company. They are incomplete in that the spaces for the required signature and counter-signature of the purchaser are blank.

The purchaser must sign the check in the presence of an employee of the company before it is issued (24, 25). As a matter of fact, even after its issue, the paper does not become a check until it is countersigned with the signature of the purchaser in the presence of the person cashing it. This information is contained on the face of the paper itself (Govt. Exh. 2, upper left and lower left corners).

Government's Exhibit 3 consists of papers in the usual form of money orders issued by the American Expreses Company. These papers are also incomplete in that they lack the signature of the company issuing officer or agent (24).

The face of each of the papers described in both Exhibits 2 and 3 includes a denomination of amount in dollars which presumably is the value of the paper after it is issued for value and properly endorsed. The total of such denominations of the alleged travelers checks is $5,400 and of the alleged money orders is $6,850.

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After the Government rested, petitioner's counsel moved to dismiss the indictment for lack of proof (63). The trial court ruled that the money orders had no value and struck reference to them from the indictment (67). However, the question of value of the alleged travelers checks (Govt. Exh. 2) went to the jury (67, 70).

The Questions Presented.

The following questions arise as a result of the action of the trial court as affirmed by the Circuit Court of Appeals:

1. Is a search made properly incident to an arrest where federal officers entered the petitioner's abode in his absence and without his permission and waited in the said premises as trespassers for six hours until he arrived, whereupon they arrested him and discovered the evidence herein, consisting of the alleged travelers checks?

2. Are blank travelers checks which are stolen before issuance to a purchaser, being incomplete in not having thereon the proper signatures necessary for negotiation, securities within the meaning of Title 18 U. S. C., Section 415?

3. Can petitioner be convicted of conspiracy to violate the National Stolen Property Act under the provisions of Title 18, U. S. C., 415(a), where there is no proof in evidence that petitioner conspired specifically to cause anything to be transported over state lines?

4. Since the proof as to the substantive charge contained in count 1 and the conspiracy charge contained in count 2 was identical, was the petitioner's acquittal on count 1 *res judicata* with relation to the charge in count 2 upon which the petitioner was found guilty, in view of this

court's recent decision in *Sealfon* v. *United States*, 332 U. S. 575, when read in conjunction with *Dunn* v. *United States*, 284 U. S. 390, 393?

Constitutional Amendment Involved.

"Amendment IV—Searches and Seizures.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

ARGUMENT.

I.

The alleged travelers checks, Government's Exhibit 2, were obtained as result of illegal search and seizure and should have been suppressed. Failure on the part of the trial court to do so and affirmance by the Circuit Court of Appeals constitutes reversible error.

A.

Before the officers gained entrance to petitioner's room they knew he was not in it (43). Upon entering they were convinced he was not there (44). Yet they waited in his room as mere trespassers until his return, *six hours later*, at which time they arrested him and found Government's Exhibit 2, the alleged travelers checks, in his closet.

It is submitted that the search, without search warrant, was unreasonable and illegal. In answer, the contention will probably be made that the search was incident to a legal arrest. This contention is untenable. Assuming,

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arguendo, that the officers had every right to search petitioner's room for the purpose of arresting him, as soon as they discovered that he was not there, it was certain that no arrest could be made within the room. Their right to remain in the room, if such initial right existed concerning the search for petitioner's person for the purpose of arrest, dissipated. The agents should have left it immediately upon finding the room vacant (*United States* v. *Vallos*, 17 F. (2d) 390, 391).

It would have been proper for them to wait in the corridor, if they wished, and to arrest him on his return to the hotel. If they did so, however, they would have had no right to search petitioner's room as an incident to such arrest (*Agnello* v. *United States*, 269 U. S. 20, 32; *United States* v. *Steck*, 19 F. (2d) 161, 163; *United States* v. *McCunn*, 40 F. (2d) 295, 296).

If the officers could not properly search the room after arresting petitioner outside of it, they certainly could not wait in the room to which they obtained entry without the knowledge or consent of petitioner and make their search incident to arrest, merely because they chose to set the place of arrest in that particular room improperly, and without right (in addition to the authorities cited above see dissenting opinions *Harris* v. *United States*, 331 U. S. 145).

The Trial Justice recognized the validity of this reasoning but did not apply it in this case because the place of petitioner's abode was a hotel room, and he did not feel that a hotel room came within the provisions of the Fourth Amendment (64-67). It is submitted that the court committed reversible error in ruling that a hotel room was not the same as a "private mansion" (65).

Since the ruling in the instant case, the question has been resolved in a recent decision by this court, wherein the defendant challenged the search of a hotel room as an incident of her arrest. The opinion in the case conclu-

sively shows that the protection of the Fourth Amendment extends to hotel rooms (*Johnson* v. *United States*, 333 U. S. 10).

The Circuit Court of Appeals distinguished this court's ruling in the *Johnson* case, *supra*, on the ground that no warrant had been issued for the arrest of the defendant in that case when the officers gained access to her hotel room to arrest her, stating that in the instant case, since a bench warrant had been issued for the petitioner, the officer had a right to enter his room. What the Circuit Court of Appeals overlooks is that in the *Johnson* case the defendant was in her room when the officers entered, whereas in this case the room was vacant when the officers entered and remained vacant for a period of six hours until the petitioner returned. It is submitted that whether the officers were acting under the authority of an arrest warrant or not they had no right to remain in the room for six hours. The warrant may have entitled them to force their way into the room for the purpose of arresting the petitioner (*U. S.* v. *Faw*, Fed. Cas. No. 15,079, 1 Cranch, C. C. 487, 1 D. C. 487), but once having done so and finding the petitioner absent, the reason for their original entry ceased to exist.

It is incontrovertible that whether the officers did or did not have an arrest warrant they could not arrest anybody who wasn't there and, consequently, they had no business to stay on the premises for the next six hours. It is submitted that the federal agents waited in the petitioner's room for that length of time merely for the purpose of being able to make what they considered a search properly incident to an arrest. A search made under the circumstances is not a search made incident to a legal arrest. It violates the mandate of the Fourth Amendment.

The Court of Appeals cited *Harris* v. *United States*, *supra*, as authority for the fact that the search in this case was incidental to a legal arrest and, therfore, a rea-

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sonable one (87). Assuming, *arguendo,* that the arrest was properly made in the petitioner's hotel room and that the *Harris* case, *supra,* is to be cited as a general authority for searches incidental to arrest, there would be no grounds herein for appealing this point to this court. Counsel is arguing, however, that the arrest was not properly made in the hotel room for the reasons stated above and now wishes to advance the further argument that the rule in *Harris* v. *United States, supra,* is not one for general application but should be strictly limited to the state of the facts as found in that case. The majority of this court held in that case that an extensive search for specific evidence of a particular crime after an arrest, pursuant to an arrest warrant, which took place in the accused's apartment did not violate the provisions of the 4th amendment prohibiting unreasonable searches and seizures, even though the evidence seized at the time had no relation to the crime for which the accused was arrested. Four of the justices of this court dissented and three of them wrote strong dissenting opinions. The gist of the dissenting opinions was that the officer or officers who could secure a warrant for the arrest of an individual could, by timing their arrest to take place in the home of that individual, secure a general, unlimited search of his home which might not be possible upon so broad a scope even after the issuance of a search warrant for probable cause. Such a general search is reminiscent of the days before the hardwon independence of this country was established when a general warrant could be secured to harass the privacy and liberty of the original colonists of this country. Indeed, such a search may even be broader than that under the general warrant. It is most respectfully submitted that the majority rule of *Harris* v. *United States, supra,* if it is to stand as authority for the conduct of searches and seizures as incident to lawful arrests,

should be limited strictly to the facts upon which it is based.

This court has indicated in *Trupiano* v. *United States*, 92 Law Ed. 1198, Adv. Op. No. 18, at page 1204, that the *Harris* rule should not be applied generally. The court stated that it did not on that occasion re-examine the situation involved in *Harris* v. *United States, supra*, but did confine the decision "to the precise facts of this case, leaving it to another day to test the Harris situation by the rule that search warrants are to be obtained and used whenever reasonably practicable."

In *Harris* v. *United States, supra*, the object of the search was to find two $10,000 cancelled checks which had been stolen from the office of the Mudge Oil Company. There was evidence connecting the petitioner with that theft. In addition, the officers were looking for means or tools that might have been used to commit the burglaries (see p. 148 of the opinion). The court indicated in the opinion that the search was not a general exploratory one to secure evidence to connect the accused with any crime made under cover of the making of the arrest, but that it was a specific search for evidence of the crime for which the accused was arrested, particularly the two mentioned cancelled checks. The search was appropriate for the discovery of such objects. It followed that they were properly subject to seizure. It turned out that during the search the officers found certain draft cards. This court indicated that the draft cards which were so found and, in fact, seized fell within that class of objects properly subject to seizure, since such cards were the property of the United States and were in the illegal custody of the petitioner and the government was entitled to possession of its property (see opinion of this court, pp. 153, 154).

Thus, the majority decision in *Harris* v. *United States* stands for the authority that where a search is made incident to a legal arrest for evidence concerning the crime

for which an accused is arrested, if any government property which is illegally in the accused's possession is found, it is subject to seizure even though not related to the crime for which the accused was arrested. It is respectfully submitted that this is the limited ruling in the case of *Harris* v. *United States, supra,* and that the mentioned case is not a general authority that any evidence of any other crime found during a search incident to a legal arrest may be seized.

In the instant case the officers sought to arrest the petitioner on the basis of a bench warrant which had been issued in connection with certain violations of the O P A laws. When he was arrested the officers found the alleged travelers checks upon which the instant prosecution was based. These alleged checks were not United States Government property and the facts are thus distinguishable from the facts in the *Harris* case, *supra.*

A further distinguishing point is that the search in the instant case was not a search for any specific evidence; it was just a general aimless rummaging around in the belongings of the petitioner, with the hope that something or anything might be found. There is no evidence in the record here to show that the officers were searching for anything which might be connected with the crime for which the petitioner was arrested. As a matter of fact those portions of the record which concern the testimony relating to the search show that it was a general search for anything that it might reveal.

It is respectfully submitted that even though the Court of Appeals below decided that the search and seizure herein was lawful on the authority of *Harris* v. *United States, supra* (87), such decision constituted reversible error even if the ruling in the *Harris* case should stand as a general authority for situations not involving the precise factual situation therein. In the *Harris* case the peti-

tioner was arrested when the federal officers entered his apartment. As was pointed out hereinabove, in the instant case the petitioner Petti was not arrested until six hours after the federal officers entered his room and had determined that he was not present.

It is this lapse of six hours which further distinguishes the facts on this appeal from that in the *Harris* case.

The trial court recognized that such a search was not incident to arrest but refused to suppress the evidence because it considered that a hotel room was not within the purview of the Fourth Amendment. The Court of Appeals, while agreeing that the question of hotel room did not remove the search from the Fourth Amendment, held that the search was incident to a legal arrest by warrant and therefore valid.

It is respectfully submitted that both courts were in error since (1) a hotel room is no different from a private home and comes within the prohibition against illegal searches and seizures contained in the Fourth Amendment, and (2) federal officers may not circumvent the constitutional safeguards contained in the Fourth Amendment, even though they are acting under an arrest warrant, where they remain on the petitioner's premises for more than six hours after they discover that he was not there.

B.

The officers testified that the papers in evidence were not discovered until after petitioner's arrest, and the Circuit Court based the legality of the search upon legal incidence to the said arrest. However, it is submitted that the officers did search the room when they originally entered; therefore, whatever was found in petitioner's room, even if chronologically subsequent to his arrest, was tainted by the unauthorized presence of the officers for a period of six hours before his return. If he had not returned, the

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instant search would clearly have been an unreasonable one. It was the unauthorized and illegal trespass of the officers that brought the fruits of the exploratory search to light. A continuing search under such circumstances is both unreasonable and illegal (*Taylor* v. *United States*, 286 U. S. 1, 5, 6).

II.

Failure to dismiss the indictment was reversible error since the blank forms, which when properly filled out would be American Express Travelers Checks, were of no value, and were not securities.

In order to prove the charge in count 2 of the indictment alleging conspiracy to transport knowingly stolen securities of a value of over $5,000, it was necessary for the Government to establish that the papers in evidence were securities of a value of over $5,000. At the outset it is submitted that the papers contained in Exhibit 2 were not securities. On the face of each blank, in the upper left-hand corner, appears the following definition of the paper itself:

> "U. S. Dollar Travelers Cheque
> When Countersigned Below With
> This Signature
> ....."

Directly below in the lower left-hand corner there appears:

> "Countersign Here in Presence of Person Cashing
> ....."

Thus, by definition on the paper itself, it does not become a check or "security" until both signatures are properly and duly placed thereon. In the present blank form it was never intended nor could it be said to be a security.

These incomplete papers were stolen before they had been issued. There are innumerable rulings that an instrument stolen before completion and issuance has no standing as a negotiable instrument and has no value (*Ledwich* v. *McKim*, 53 N. Y. 307, 313; *Davis Sewing Machine Co.* v *Best*, 105 N. Y. 59, 67, 68; *Holzman, Cohen & Co.* v. *Teague*, 172 App. Div. 75, 158 N. Y. S. 211; *Nicholaras* v. *Stewart*, 25 N. Y. S. [2d] 157).

The conspiracy count defines these incomplete papers as "securities" of a value of over $5,000. There is no charge contained in the conspiracy count that they had been forged or that there was any intent on the part of petitioner or anyone else to forge them. If the government intended to rely on a forgery the definition of the conspiracy could have been based on that portion of the statute which relates to transportation of forged instruments, which contains no requirement of value of over $5,000. The pertinent part of the substantive statute (Sec. 415, Title 18, U. S. C.)* concerning forgeries is:

> "* * * or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited, * * *."

However, the indictment did not charge an offense readable on this forgery section of the statute. The instant charge of conspiracy involves a crime defined by that portion of the substantive statute which reads as follows:

*All sections of Title 18 of the United States Code were repealed by the recodification of Title 18 which took effect on September 1, 1948. However, any right or liability which existed concerning the pertinent acts at the time of the repeal was not affected thereby (Chapter 645, Public Law 772, Sections 20, 21). In the new codification the old Section 415 is now rewritten as Section 2314.

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"Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken * * *."

There can be no implication of a future forgery with relation to the instruments set forth in this indictment. The Government cannot indulge in if's, and's or but's. What anyone would do with these papers, or could do to them, with intent to defraud is of no moment. The petitioner is not on trial for forging securities, much less thinking about doing so. He was convicted of conspiring to transport *securities*. The evidence submitted in proof of this charge must by a clear, cool appraisal actually reveal securities of a value of over $5,000, in the physical form in which they existed at the time of the alleged conspiracy. It is not a federal offense to forge securities. It is only an offense to transport forged securities over state lines.

The blank forms in evidence are not securities and have no value other than the paper and ink of which they are comprised. The papers in evidence are neither fish nor fowl; they are neither securities nor forgeries and so do not come under any of the penal provisions of Title 18, U. S. C., Section 415 or 418(a).

Nevertheless, the Court of Appeals, after stating that the authorities were not in accord as to precise legal characteristics of travelers checks before they have been completely filled out, decided that these checks came within the definition of securities as contained in Title 18, Section 415, and that they were of a value equivalent to the face value printed on each paper (88). The rationale of this

decision is that if the theft of the checks had occurred *after* issuance to a purchaser they would be a security for the purposes of the National Stolen Property Act (*Pines* v. *United States*, 123 Fed. [2d] 825, 828, C. C. A.). What the court overlooked was that the *Pines* case involved an indictment under that portion of Title 18, Section 415 quoted hereinabove involving the fraudulent transportation of falsely made or counterfeited securities. It did not involve the transportation in interstate commerce of securities of the value of over $5,000 known to have been stolen, as was charged herein. The case is entirely distinguishable in that not only was the charge different but the proof of such charge was different.

In the instant case, petitioner was charged with transporting stolen securities in interstate commerce of a value of over $5,000, knowing the same to have been stolen, and also with conspiracy to commit the substantive offense. It was, therefore, necessary to prove (1) that securities were stolen; (2) that petitioner conspired to transport same in interstate commerce knowing them to have been stolen, and (3) that they were securities of a value of more than $5,000.

In the *Pines* case, the charge was transporting forged, altered and counterfeited securities unlawfully and with intent to defraud, to wit, a travelers check purportedly issued by the Gotham Trust Company of New York, a fictitious bank, in the denomination of $100, knowing the same to have been falsely made, forged and altered. The Government's proof in such a case consists of showing the false character of the alleged security and proving the fraudulent intent. It would not be necessary to prove value of over $5,000, or that the instrument was theretofore stolen, within the knowledge of the defendant.

It may readily be seen that the charges involved in the two cases are totally different and that the decision in the *Pines* case is not authority for the fact that blank travelers

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checks stolen before issuance have value. The *Pines* case merely stated that since the purported travelers check involved was allegediy countersigned by a purchaser, and since a valid travelers check is complete as against a bank "when issued", the spurious paper constituted a false security within the purview of the Act because falsely made to simulate a valid travelers check. This holding merely affirms the language of the statute which says that it is a crime to transport a forged security across the state line for a fraudulent purpose. It is not authority that an incomplete, unissued security which is stolen before issuance has value or is a valid security.

The Court of Appeals, in addition to following the *Pines* case as aforesaid, went even further in order to place the facts of this case into the frame of the *Pines* case. The court stated, in referring to the wholly unexecuted blanks on the check form:

> "The thief can use the check to commit fraud even more easily than when forgery of the countersignature is required to make the document usable" (88).

Therefore, in this case the Court of Appeals said—here we have blank papers purporting to be travelers checks; they were never issued; however, since the thief could forge them to look like issued securities they have value. It should be noted, however, that when these alleged checks were found they were not forged; they were still in blank form. Most important there was no charge of forgery in the indictment herein.

It is, therefore, submitted that the Court of Appeals committed error in coming to its decision as aforesaid, and that such error creates a precedent which will in effect vitiate the requirement of value of $5,000 to give federal courts jurisdiction under the National Stolen Property

Act, which is certainly contrary to the intent which Congress had when the Act was passed. It was not congressional intent, nor could it constitutionally be, to punish anticipated, *in futuro*, forgery under the provisions of the National Stolen Property Act.

III.

The verdict of guilty on the conspiracy count, being unsupported by proof, should have been set aside. Failure to do so constituted reversible error.

Count 2 of the indictment charges a conspiracy between the petitioner and Rosenberg and other persons named and unknown, to violate Title 18, U. S. C., Section 415, in that it was part of the said conspiracy that they would transport and cause to be transported, securities of the value of over $5,000, knowing same to have been stolen, from Newark, New Jersey to New York, New York. This count is laid under Title 18, U. S. C., Section 418a*, which provides that if two or more persons enter into an agreement or conspiracy to violate any provision of Sections 413 through 419, of said Title and do any overt act in furtherance thereof, such persons shall be punishable as provided in said Sections 413-419.

The conspiracy count as thus laid is distinguishable from a conspiracy count laid under the provisions of Title 18, Section 88*. The former is not a general conspiracy statute but applies solely to the provisions of the National Stolen Property Act. The latter is general in its scope providing that conspiracy to commit *any* offense against

*There is no section in the recodification which specifically reenacts Section 418a, providing for a ten-year sentence for conspiracy to commit the specific crime charged in Section 415, now Section 2314 of the Revised Code. However, Section 88, the former general conspiracy statute, has been revised and reenacted as Section 371 of the new Title 18 of the Code, and it now provides for a maximum of five years for conspiracy to commit any offense against the United States, with the proviso that punishment for conspiracy to commit a misdemeanor shall not exceed the maximum punishment for such misdemeanor.

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the United States combined with an overt act shall be a crime. It is to be noted that the special conspiracy statute provided for in Section 418a of the Code provides a maximum punishment of ten years imprisonment (*cf.* Section 415) whereas the general conspiracy statute as contained in Section 88 provides a maximum term of imprisonment of only two years. It, therefore, follows that Congress, in enacting the special conspiracy statute entailing a maximum punishment by imprisonment of five times greater than that of the general statute, most certainly intended to define this punishment for a specific conspiracy which involved transportation over state lines as a part of the express agreement of the parties.

The weight of available authority confirms this view, since the cases which discuss the special conspiracy statute under the National Stolen Property Act, and other such special acts, all point to the fact that proof of an express agreement to cross state lines must be adduced in order to convict. This will be pointed out in the discussion of these cases below.

Assuming, *arguendo*, that there was in fact a conspiracy herein, the evidence definitely disclosed that such conspiracy was only between the two conspirators named in the indictment as defendants, namely, the petitioner and Rosenberg. The record discloses that the only other person who dealt with the alleged securities other than the petitioner and Rosenberg was the thief, Cash, who brought said alleged securities to Rosenberg. There is no evidence to show that Cash was a part of any conspiracy. All he did was to dispose of the fruits of his crime by selling them to Rosenberg. What Rosenberg did with them thereafter was no concern of his (*United States* v. *Zeuli*, 137 F. [2d] 845; *United States* v. *DiRe*, 159 F. [2d] 818, affirmed 92 L. Ed. 219, adv. op. No. 6).

The alleged conspiracy therefore resolved specifically to an agreement between the petitioner and Rosenberg.

If the evidence adduced at the trial supports and proves such an agreement in violation of count 2 of the indictment then no error was committed herein. However, it is submitted that the evidence falls far short of proving the charge.

Briefly, if Rosenberg's testimony is to be believed in its entirety, the following occurred: Rosenberg met petitioner *by accident* on 50th Street and Broadway, in the evening of October 28, 1946. A short conference ensued during which Rosenberg stated that he had some money orders and petitioner agreed to see what he could do about it. A telephone call was made from the Hotel Taft to a Humbolt exchange in Newark at 7:17 P. M., that same evening, which presumably was a conversation between petitioner and Rosenberg. Rosenberg testified that the substance of this conversation was that petitioner said he would come over. Although there is evidence that other telephone calls were made, there is nothing in the record to show what the content of conversation was in such calls. It must be presumed since the call was made to Rosenberg and since Rosenberg was a witness at the trial that if there was anything in those telephone calls which would further prove the charges alleged, it would have been brought out. Failure to do so is conclusive that the telephone calls had no relation to the charges in the indictment. Rosenberg further testified that at a later occasion or occasions he met the petitioner again at his home in Newark and that petitioner informed him that he could not do anything with the papers. Petitioner was then arrested with the papers in his possession early in the morning on the 1st of November. Rosenberg's testimony was uncorroborated except that Eleanor Strom testified that she saw him converse with petitioner at 50th Street and Broadway and that she saw petitioner at Newark later that evening. She did not, however, hear the alleged conversations.

From this testimony there is no doubt that Rosenberg and petitioner could be charged and convicted of con-

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spiracy to dispose of the alleged travelers cheques. However, this is not a federal offense. Receiving stolen goods and conspiring to dispose of the same is strictly a state matter, unless the agreement reached specifically involves crossing state lines. Nowhere in the entire record of this case is there any agreement between the alleged co-conspirators to transport the papers involved in interstate commerce.

The fact that petitioner was arrested with the papers in New York is of no probative force in connection with conspiracy count since it is equally consistent with guilt or innocence of the petitioner. Whoever transported the papers may well have conceived his own scheme to take them to New York after he had received them from Rosenberg.

It still takes two or more persons to form a criminal conspiracy. Where one agrees to dispose of stolen property and there is no specific agreement as to the manner or place in which such property is to be taken for disposal, and that person, after receiving the property on his own initiative decides to transport it in interstate commerce, he may be guilty of the substantive offense of transportation, but there would be no conspiracy to transport. Under the facts adduced at this trial, by the government witnesses, it is entirely possible that there was no agreement to transport these securities to New York and that any person who did so transport them acted on his own sole individual initiative.

The circumstances of the alleged travelers cheques being found in New York is not proof of a conspiracy to so transport in interstate commerce. In order to justify the conviction of crime on such circumstantial evidence, it is necessary that the directly proved circumstances be such as to exclude every reasonable hypothesis but that of guilt (*United States* v. *Baker, et al.*, 50 F. [2d] 122, 123; *United States* v. *Russo*, 123 F. [2d] 420, 423)

There is no fetish about a conspiracy charge. It must be proven like any other charge in a case, Rosenberg's testimony is merely to the effect that he asked petitioner if the latter could dispose of certain papers, and that the petitioner told him he would try and see what he could do. This falls far short of an agreement to transport the papers in Interstate Commerce. The Jury found that appellant was not guilty of either transporting these papers or causing them to be transported in Interstate Commerce. It must, therefore, be presumed that the appellant's conviction on conspiracy charge is based on evidence other than that propounded by the Government in support of the substantive offense. There is no other such evidence in this record. The entire indictment thereby falls, as being unsupported by the evidence and should be set aside.

In *United States* v. *Silva*, 131 F. 2d 247, the Court stated on page 249:

> "It was necessary to show that the appellant had agreed to act in concert with someone to commit the substantive crimes charged. * * * There is no magic about a count charging conspiracy. It is simply an accusation of a distinct crime and evidence in support of it must be so clear and convincing as to leave no reasonable doubt. The government merely fails in its proof when its evidence but creates a sort of mystery as to which one guess is as good as another. *Copeland* v. *United States*, 5 Cir., 90 F. 2d 78; *Shannabarger* v. *United States*, 8 Cir., 99 F. 2d 957; *Kassin* v. *United States*, 5 Cir., 87 F. 2d 183. Reversed."

There is considerable authority to the effect that there can be no conspiracy concerning the transportation of stolen articles in Interstate Commerce unless it is under-

stood to be a part of the project that they plan to cross State lines.

U. S. v. *Crimmin* (2nd Cir.), 123 F. 2d 271, 273;
Gable v. *United States,* (7th Cir.) 84 F. 2d 929, 930;
Linde v. *United States* (8th Cir.), 13 F. 2d 59;
Crain v. *United States* (5th Cir.), 148 F. 2d 615, 617, 618.

In the case at Bar, there was no evidence of an agreement to transport across State lines in Interstate Commerce.

In *United States* v. *Penn, et al.,* 131 F. 2d 1021, 1022, the two defendants were charged with conspiring to transport kidnapped persons in interstate commerce. Hhe Court stated:

> "Thus the case at best was no more than that, although they had agreed to kidnap, they had not settled upon any place where they should conceal those kidnapped, and especially that they had not settled that they should take them outside the state. It was necessary for them to agree upon that; Sec. 408c is expliit, it is a corollary of Sec. 408a, which makes it a crime to transport a kidnapped person in interstate commerce. Men do not conspire to do that which they entertain only as a possibility; they must unite in a purpose to bring to pass all those elements which constitute the crime. The accused never went so far as to this vital element of the crime, and an acquittal should have been directed."

In *Crain* v. *United States* (*supra*) wherein the defendants were convicted under an indictment charging conspiracy to transport stolen monies of a value of over $5,000 in Interstate Commerce, a motion for a directed

verdict was made at the close of the evidence. Neither of the appellants took the stand, and no witness testified to knowledge of any agreement between the appellants to transport the stolen money in Interstate Commerce. One of the appellants had left Miami and gone to Minneapolis and the other two were at the point of leaving Miami for other states when arrested. It was held that this did not show an unlawful agreement to transport in Interstate Commerce. The Court of Appeals in reversing the conviction for conspiracy stated at page 617:

> "Interstate Transportation must be involved in the conspiracy to support a conviction. There is no evidence in the record to sustain such a charge."

The case at Bar is no different either factually or legally. It is submitted that the conviction on Count 2, for conspiracy should be set aside.

The Court of Appeals stated that since Rosenberg delivered the checks to petitioner in New Jersey who was rooming in New York that the inference was plain that the conspirators contemplated such transportation (89). In view of the authorities cited herein, it is submitted that the Court could not indulge in such inference. There was no testimony as to any agreement as to where the securities were to be disposed of or that they were in fact to be transported in interstate commerce. It is the present contention that in order to convict under the special conspiracy statute herein and to prove such conviction beyond a reasonable doubt, that an express conspiracy to transport across state lines must be proven. In addition, the inference was just as plain that the petitioner could have disposed of the checks in New Jersey without taking them to his room in New York, which brings us back to the old rule that where there are two hypotheses based upon inference and presumption, one of which leads to innocence and the other to guilt, the doubt must be

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resolved in the petitioner's favor (*United States* v. *Baker*, *supra*, *United States* v. *Russo*, *supra*).

We submit that this court has never passed upon the point that the proof necessary to convict under a special conspiracy statute such as the one involved here must be direct proof of an express agreement to transport across state lines. There must have been some reason for Congress to enact special conspiracy statutes when the general conspiracy statute contained in Title 18, Section 88 would have sufficed. The reason is that under the special statute, such as contained in Title 18, Section 418a, it is a conspiracy to commit a specific type of crime and it follows that the specific species of conspiracy must be expressly proven since there is no federal offense where there is no express agreement to cross state lines. It is still a maxim of law in this country that a defendant cannot be convicted unless it is upon evidence which shows his guilt beyond a reasonable doubt and that he is presumed innocent until proven guilty by the credible evidence at his trial.

The proof necessary to convict under the special conspiracy statutes must necessarily be of an affirmative nature which proves an express agreement to transport in interstate commerce.

IV.

Since petitioner was acquitted on the count charging the substantive offense, his conviction under the count charging conspiracy to commit the substantive offense, being supported at the trial by identical proof, was error, in that it constituted a conviction for a charge which was res judicata and said conviction should have been reversed by the Court of Appeals.

Petti was acquitted on the charge of transporting, or causing to be transported, stolen securities in interstate commerce. It must follow therefrom that he did not either

transport, or even cause the alleged securities to be transported. The Jury, however, found Petti guilty of conspiring to do this.

The entire case, covering the two counts, consisted of a single transaction concerning a package of alleged travelers' checks which the petitioner contended were papers of no value whatsoever.

The evidence introduced by the Government to prove the commission of the offenses alleged in both counts was identical as to each count. Acquittal of the charge of transporting, or causing to transport, securities over the value of $5,000 in Interstate Commerce, therefore, becomes *res adjudicata* of the charge of conspiracy to do so in violation of law. The defendant could not be convicted of conspiracy on the same evidence offered in proof of the substantive charge for which he was acquitted. Where the Government had to rely on the self same evidence in both counts, the acquittal on one was a complete bar to the other.

In *Sealfon* v. *United States*, Vol. 92, Law. ed. 215, adv. op. No. 6, this Court stated at page 217 of the opinion:

> "It has long been recognized that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. *Pinkerton* v. *United States*, 328 U. S. 640, 643, 90 L. ed. 1489, 1494, 66 S. Ct. 1180. Thus, with some exceptions, one may be prosecuted for both crimes. Ibid. But *res judicata* may be a defense in a second prosecution. That doctrine applies to criminal as well as civil proceedings (*United States* v. *Oppenheimer*, 242 U. S. 85, 87, 61 L. ed. 161, 164, 37 S. Ct. 68, 3 A. L. R. 516; *United States* v. *De Angelo* [C. C. A. 3d N. J.] 138 F. 2d 466, 468, annotation in 147 A. L. R. 991; see *Frank* v. *Mangum*, 237 U. S. 309, 334, 59 L. ed. 969, 983, 35 S. Ct. 582)

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and operates to conclude those matters in issue which the verdict determined through the offenses be different. *See United States* v. *Adams*, 281 U. S. 202, 205, 74 L. ed. 807, 808, 50 S. Ct. 269.

Thus the only question in this case is whether the jury's verdict in the conspiracy trial was a determination favorable to petitioner of the facts essential to conviction of the substantive offense. This depends upon the facts adduced at each trial and the instructions under which the jury arrived at its verdict at the first trial."

After determining that the evidence at both trials was identical, the Court stated further on page 218:

> "It was a second attempt to prove the agreement which at each trial was crucial to the prosecution's case and which was necessarily adjudicated in the former trial to be non-existent. That the prosecution may not do."

The fact that the defendant was tried on two counts on one trial is no different than if he had been tried on two separate occasions on two different indictments, where the proof for each indictment was identical.

Each count in an indictment is regarded as if it were a separate indictment. Whether offenses are separately charged in the counts of a single indictment or if they are charged in separate indictments and separately tried, the same rule must hold (*Dunn* v. *United States*, 284 U. S. 390, 393, 76 L. Ed. 356, 358-359).

This is not a case of attempting to reconcile an inconsistent verdict by the Jury. To the contrary, the appellant contends that a Jury having found that he was not guilty of either transporting "securities" or causing them to be transported, thereby disposed of the conspiracy

charge since the adjudication on the substantive charge included any other charge brought against the appellant which the Government offered to prove by the same evidence adduced to prove the said substantive charge.

The Circuit Court held in its opinion that the doctrine of the *Sealfon* case, *supra*, applied only to a situation where there were two separate trials. It is submitted that this was a misapplication of the doctrine and that in view of *Dunn* v. *United States*, *supra*, it makes no difference whether the counts were laid in separate indictments in two separate trials or whether they were laid in one consolidated indictment at one trial. Acquittal on the substantive charge is *res judicata* of the conspiracy charge where both charges are sought to be proved by the same evidence. In view of the rulings in both *Dunn* v. *United States*, *supra*, and *Sealfon* v. *United States*, *supra*, it is submitted that this court should grant certiorari to formalize the rules in both cases so that the courts of the United States may have the benefit of a clear doctrine to apply to criminal cases involving conspiracy. We believe it was the intention of this court to abrogate the practice of jointly charging substantive offenses and conspiracies, if such practice is unwarranted in the evidence, to preclude subjecting defendants to shotgun like indictments, in which, if the charge from one barrel missed the other would hit the target.

CONCLUSION.

For the reasons assigned and the authorities in support thereof, this Court should reverse petitioner's conviction.

Respectfully submitted,

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